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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY__________ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA – PHOENIX DIVISION

Bradley Schroeder, an individual

Plaintiff,

vs.

M & I Bank, FSB, a Wisconsin Banking Corp.
FOLKS & OCONNOR, PLLC
John and Jane DOES 1 THROUGH 10,

Defendants.

Case No.: CIV '08 2190 PHX ROS

Assigned for all purposes to the Honorable ______________

COMPLAINT FOR RESCISSION, MONEY DAMAGES, AND JURY TRIAL DEMAND

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

I. Preliminary Statement

1. Plaintiff Bradley Schroeder, an individual, brings this action against M & I Bank, FSB (a Federal Savings Bank), FOLKS & O'CONNOR, PLLC, and John and Jane DOES 1 – 10 (collectively hereinafter "Defendants") as an affirmative action matter in the nature of a defense in recoupment and set-off to a non-judicial foreclosure and to:

(a) Give effective Notice to Rescind and Cancel;

(b) Enforce Rescission;

(c) Reimburse all fees, charges, and costs paid in a consumer credit transaction pursuant to violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*

("TILA"), and its implementing regulations at 12 C.F.R. § 226 *et seq.* (Reg. Z); and

(d) Obtain reasonable attorney fees.

2. Plaintiff also seeks declaratory and injunctive relief to further restrain Defendants under Arizona Revised Statutes Annotated ("ARS") §§ 44-1521 *et seq.*, common law fraud, misrepresentation and deceit, against Defendants herein. All such Arizona state law claims are properly asserted under this Court's pendent or supplemental jurisdiction.

3. The Defendants are proper parties to be sued for claims arising out of the transaction when Defendants are attempting to *enforce contractual obligations* and the Plaintiff is in an affirmative or defensive position asserting a rescission claim under TILA; Reg. Z, asserting a basis to rescind under Reg. Z § 226.23(h)(2), *Special rules for foreclosures*, when a foreclosure is underway, and other statutory relief under Arizona statutes.

4. A rescission action may also be brought against an assignee, regardless of whether the assignee is a "creditor" or whether the violation was apparent on the face of the disclosure statement under 15 U.S.C. § 1641(c).

II. Parties

5. Plaintiff Bradley Schroeder, (hereinafter "Plaintiff"), is a *consumer* and a *natural person* as that term is defined under 15 U.S.C. § 1602(h) and ARS § 44-1521. Plaintiff has substantive rights as a citizen domiciled in Arizona and as the owner of the *principal dwelling* known as 6543 East Military Road, Cave Creek, Maricopa County, Arizona 85331(hereinafter the "Property"). Since the year 2000 and at all times relevant and material hereto, Plaintiff resides on the Property as his home.

6. Defendant M & I Bank, FSB is a Wisconsin Banking Corporation, (hereinafter "M & I Bank") does business in this forum extending credit as an originator of mortgage loans. M & I Bank is a *creditor* as that term is defined under 15 U.S.C. § 1602(f) and Reg. Z § 226.2(a)(17) and at all times relevant hereto is regularly engaged in the business of extending consumer credit for which a finance charge is or may be

imposed and is payable in more than four installment by written agreement. This Defendant may be served with service of process by serving the Officer in Charge c/o M & I Marshall & Isley Bank, Mark F. Furlong, CEO, 770 North Water Street, Milwaukee, Wisconsin 53202 and its statutory agent c/o Jeffrey H. Verbin, Greenberg Traurig LLP, 2375 East Camelback Road, Suite 700, Phoenix, Arizona 85016

7. Defendant FOLKS & O'CONNOR, PLLC is the purported Trustee pursuant to a Notice of Trustee's Sale, may claim a pecuniary interest, and is joined and needed for just adjudication. This Defendant may be served with process by serving it's the Officer in Charge at its principal office, c/o FOLKS & O'CONNOR, PLLC, Larry O. Folks, 1850 North Central Ave., Suite 1140, Phoenix, Arizona 85004, and by serving its statutory agent c/o Keytlaw LLC, 2415 East Camelback, Suite 700, Phoenix, Arizona 85016

8. Defendants John and Jane DOES 1-10 are involved in the instant case and transaction and are currently unknown to Plaintiff. Said entities will be joined upon further discovery of their true nature and liability once these facts are known and supported by competent evidence.

III. Jurisdiction/Venue

9. This Court has Jurisdiction in this proceeding pursuant to 28 U.S.C. § 1331, pursuant to 15 U.S.C. § 1640(e) for TILA claims, and pursuant to 28 U.S.C. § 1367 for supplemental jurisdiction of Plaintiffs' state law claims because these claims are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy under Article 3 of the United States Constitution. The Court has authority to issue a declaratory judgment by virtue of 28 U.S.C. § 2201. Counts arising under contract, common law, and the law of conveyances in real property are properly asserted under this Court's pendent jurisdiction.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 generally whereby the real property and a substantial part of the events and claims, the subject of this suit, are situated here in this District.

IV. Conditions Precedent

11. All conditions precedent have been performed or have occurred and, at minimum, TILA; Reg. Z violations may be asserted affirmatively and defensively as a recoupment or set-off pursuant to 15 U.S.C. § 1638 *et seq*. The mere loss of a statutory right to disclosure is an injury that gives the consumer standing for Article III purposes, *DeMando v. Morris*, 206 F.3d 1300 (9th Cir. 2000).

12. Plaintiff has standing as of the date of the contract and where the contract is a federally related mortgage transaction governed by TILA; Reg. Z.

V. Statement of Facts Material to the Transaction

13. In June 2007, Plaintiff applied for a conventional mortgage loan through a mortgage broker, Federal Mortgage Funding, (hereinafter the "Broker") acting as a lender's agent and representative.

14. The Broker assessed Plaintiff with a purported credit score average of approximately 770 and falsely induced the Plaintiff by verbal assurance of the best possible mortgage loan terms with a competitive interest rate.

15. The original application, copy attached hereto as EXHIBIT 1, and federally related mortgage transaction at the root of this case (hereinafter the "Transaction") was thereafter, submitted to the Broker.

16. Upon receipt of the application, the Broker intentionally concealed material facts by failing to ever provide a Good Faith Estimate disclosing the actual settlement service cost to close the mortgage loan.

17. The Broker, thereafter, requested an appraisal while steering the Plaintiff to a lender who would pay the Broker a yield spread premium or commission outside of Closing.

18. Plaintiff's application related to this Transaction consolidated and refinanced previous mortgage loan transactions covering real property then and now the primary principal residence and home of the Plaintiff.

19. The mortgage loan consolidation and cash out was scheduled to close after the

Broker received the assessed property appraisal with documents signed on or about August 31, 2007 (the "Closing").

20. M & I Bank paid the Broker a yield spread premium outside of Closing, a payment to the Broker for increasing the loan interest to a rate above "par," which is a rate higher than the rate at which M & I Bank would otherwise be willing to make the loan.

21. The application, EXHIBIT 1, specifically stated the Plaintiff's "Base Employment Income of $1.00" and Plaintiff provided nothing more than a verbally stated income and no actual income verification.

22. At the purported Closing, Plaintiff entered into a mortgage loan Transaction with M & I Bank and was provided with copies of various documents to include those material to this case identified as EXHIBIT 2:

a. A Fixed/Adjustable Rate Note;
b. A Deed of Trust security instrument;
c. An Adjustable Rate Rider;
d. A Truth in Lending Disclosure Statement;
e. A HUD – 1 Settlement Statement;
f. Two Notices of Right to Cancel;

23. The HUD – 1 Settlement Statement, EXHIBIT 2, specifically identifies on Line 803, an appraisal fee to Luxe Appraisal Group of $695.00. Said appraisal was paid out of the proceeds, or the "Amount Financed" at the Closing.

24. Appraisal fees, credit report fees, and fees for notarizing deeds, and other documents may be *excluded* from Finance Charge fees under 15 U.S.C. § 1605(e)(4)-(6); Reg. Z § 226.4(c)(7)(iii) provided the settlement service fees are bona fide and reasonable.

25. Accordingly, a $695.00 appraisal fee charged to the Plaintiff from the net proceeds is not bona fide and reasonable.

26. Albeit, the Transaction required Plaintiff to pay money arising out of a transaction

in which money, property, or goods and services were the subject thereof and the same were primarily for personal, family and household purposes.

27. The Transaction and all relevant documents were verbally described to Plaintiff at the Closing as a Consumer Credit Transaction.

28. The Transaction is a Closed-end Credit Transaction as that term is defined in Reg. Z § 226.2(10) where a Deed of Trust security interest was retained in favor of M & I Bank designating The Law Office of Rex C Anderson, PC as the Trustee.

29. The Transaction on the face of all documents is subject to all content requirements set forth in 15 U.S.C. § 1635(a), and 15 U.S.C. § 1638; Reg. Z §§ 226.17 – 226.23.

30. The material documents specifically identified as Plaintiff's EXHIBIT 2 failed in one or more material respects to disclose to the Plaintiff in a form and manner required by applicable statute and regulation, the true nature and cost of this Transaction.

31. The failure to accurately disclose a bona fide and reasonable appraisal charge and settlement service fee varies by more than $100.00 and materially understates the "Finance Charges" on the Truth in Lending Disclosure Statement, EXHIBIT 2.

32. Pursuant to Reg. Z § 226.23(h)(2), *Special rules for foreclosures, Tolerance for Disclosures*, when a foreclosure is underway, the tolerance for Rescission is $35.00 for an understated "Finance Charge" disclosure.

33. The failure to accurately and effectively disclose the Truth in Lending Disclosure Statement is a failure to provide accurately a *material* disclosure as that term is defined under 15 U.S.C. § 1602(u); Reg. Z § 226.23(a)(3) n48.

34. M & I Bank ratified this Transaction with an inaccurate, improper, and ineffective disclosure of the Finance Charge amount in the Truth in Lending Disclosure Statement.

35. M & I Bank knew, or should have known, that said appraisal settlement service charge is extravagantly inflated and that no Good Faith Estimate of settlement service charges was ever disclosed prior or at origination.

36. Plaintiff alleges that M & I Bank ratified this Transaction without verifiable income and not based upon Plaintiff's ability to pay the scheduled payments. Accordingly, Plaintiff was unable to sustain payments within eights months of Closing.

37. The Transaction is substantively and procedurally based upon the asset, Plaintiff's home, and that such a lending policy is at minimum, overreaching and unfair.

38. Plaintiff read the documents provided at Closing and relied upon said representations and the *material* TILA Disclosures Statement as being accurate, bona fide, and reasonable. Otherwise, Plaintiff would have foregone the Transaction completely, sought a better interest rate and reasonable settlement service charges.

39. Nevertheless, Plaintiff now exercises his continuing right to rescind the Transaction as a defense against the non-judicial foreclosure as a claim in recoupment and set-off due to the foregoing *material* disclosure failures.

40. Plaintiff's continuing right to rescind the Transaction is statutorily extended for three years under 15 U.S.C. § 1635(f) when M & I Bank failed to deliver, clear and conspicuously, the foregoing *material* disclosures described herein.

41. The TILA Disclosure Statement and *material* omissions imposed by M & I Bank induces confusion as to source and sponsorship with respect to services, finance charges, fees and applicable statutes. The disclosures and lack thereof are intentionally unfair and deceptive.

42. A controversy has arisen due to M & I Bank's failure to provide accurate *material* disclosures so that Plaintiff may tender any balance and extinguish the Transaction by operation of law.

43. The foregoing acts and *material* omissions of M & I Bank were undertaken willfully, persistently, intentionally, knowingly, and/or in gross or reckless disregard of the Plaintiff's disclosure rights.

VI. Claims for Relief

Count 1 – Rescission under TILA; Reg. Z Against All Defendants

44. Plaintiff incorporates each paragraph set forth above as if fully stated herein.

45. As a result of Defendants failure to provide accurate *material* disclosures correctly as described above, Plaintiff is entitled and has exercised his right of rescission of the Transaction.

46. Rescission of the Transaction extinguishes any liability Plaintiff has to Defendants for finance or other charges arising from the Transaction.

47. Defendants have a fiduciary duty and obligation to perform upon this notice of rescission by canceling this specific Transaction as well as any enforcement thereof. Accordingly, any alleged security instrument is void and unenforceable under 15 U.S.C. § 1635(b).

48. Defendants have twenty-days (20) to refund or credit the alleged account all monies paid and to void the security interest, or seek judicial guidance.

49. Defendants performance is a condition precedent to Plaintiff's duty to tender and failure to lawfully respond gives rise to statutory and actual damages under 15 U.S.C. § 1640.

50. Any further acts to enforce an invalid security instrument and impose finance charges and fees are wrongful, improper, and a serious breach of fiduciary duty associated with Defendants obligations. Such acts violate TILA; Reg. Z, the Real Estate Settlement Procedures Act, (codified at 12 U.S.C. § 2605), and are contrary to the explicit statutory requirements and contract between the parties.

51. Defendants' acts entitle Plaintiff to statutory and actual relief, orders enforcing rescission, and a reasonable attorney fees.

Count 2 – TILA; Reg. Z Against M & I Bank

52. The original payee of the note and beneficiary of all other documents at a purported closing with M & I Bank acted in contravention of TILA 15 U.S.C. § 1601 *et seq.* and Reg. Z in the following particulars, each and all of which may also be asserted affirmatively and defensively by Plaintiff as a result.

53. The TILA Disclosure Statement, and all documents provided to Plaintiff in

conjunction with this consumer credit transaction violated the requirements of Truth in Lending and Regulation Z in the following other respects:

a. By failing to provide all required disclosures prior to consummation of the transaction in violation of 15 U.S.C. § 1638(b); Reg. Z § 226.17(b);

b. By failing to make required disclosures 'clearly and conspicuously' in writing in violation of 15 U.S.C. § 1632(a); Reg. Z § 226.17(a)(1);

c. By failing to include in the Finance Charge certain charges imposed by M & I Bank payable by Plaintiff incident to the extension of credit as required by 15 U.S.C. § 1605 and Reg. Z § 226.4, thus improperly disclosing the finance charge in violation of 15 U.S.C. § 1638(a)(3) and Reg. Z § 226.18(d)

d. By failing to accurately and effectively disclose the TILA Disclosure Statement in violation of 15 U.S.C. § 1602(u); Reg. Z § 226.23(a)(3)

54. Said acts entitle Plaintiff to statutory and actual relief, and a reasonable attorney fee.

Count 3 – Arizona Revised Statutes §§ 44-1521 *et seq.*

55. Plaintiff realleges and incorporates herein by reference Counts 1, 2, and every allegation set forth above.

56. Plaintiff brings this action as a private attorney general acting on his own behalf, pursuant to ARS §§ 44-1521 *et seq.*, (the Arizona Consumer Fraud Act or "ACFA").

57. Plaintiff is acting in this capacity to remedy the ongoing unlawful, unfair and fraudulent business practices alleged herein, and to seek injunctive relief and restitution on his own behalf as being affected thereby.

58. The foregoing acts and omissions of the Defendants affect inclusively trade and commerce, and affect merchandise as this term is defined under ARS §§ 44-1521 *et seq.*

59. The ACFA defines unfair competition to include any unlawful, unfair, or fraudulent business act or practice and provides that a court may order injunctive relief and restitution to affected parties as a remedy for any violations of the ACFA.

60. Beginning on or before the dates indicated related to the Transaction and at all times relevant herein, Defendants and the DOE Defendants have committed acts of unfair competition proscribed by the ACFA including the practices alleged herein against Plaintiff.

61. Prior to the filing of the complaint in this action, and continuing thereafter, Defendants have systematically violated the provisions of TILA; Reg. Z, the Transaction, the contract between the parties, and to such extent as to induce confusion of source, sponsorship of services, finance charges, fees and applicable disclosure statutes against Plaintiff.

62. These violations are and were a matter of Defendants' standard corporate policy, and constitute a consistent pattern and practice of unlawful corporate behavior.

63. The business acts and practices of Defendants, as hereinabove alleged, constitute "unlawful" business practices under ACFA in that, for the reasons set forth above, said acts and practices violate the provisions of TILA; Reg. Z, the Transaction and contract between the parties.

64. The business acts and practices of Defendants, as hereinabove alleged, constitute "unfair" business practices under ACFA in that said acts and practices offend *public policy* and are substantially injurious to the Plaintiff and all consumers. Said acts and practices have no utility that outweighs their substantial harm to the Plaintiff, consumers, and potential homeowners.

65. In the course of this Transaction, each Defendant made one or more misrepresentations and/or failed to make accurate representations and/or failed to provide material information about the Transaction as set forth more fully above.

66. Specifically Defendants processed and ratified the Transaction, substantially amended *material* disclosures under TILA, failed to lawfully and effectively provide a TILA Disclosure Statement, failed to provide a Good Faith Estimate, failed to comply with the contract between the parties, and failed to comply with statutory good faith and fair dealing.

67. Said misrepresentations and failure to make accurate representations were made knowingly or with reason to know that Plaintiff would rely thereon.

68. Said misrepresentations and failure to make accurate representations were material to the Transaction from origination to present.

69. Said misrepresentations and failure to make accurate representations were made with intent and the Plaintiff relied thereon by seeking legal counsel and filing this claim.

70. Plaintiff did reasonably rely as specified in these factual allegations.

71. Plaintiff was thereby damaged and has a substantial ascertainable loss.

72. The business acts and practices of Defendants, as hereinabove alleged, constitute "fraudulent" business practices under ACFA in that said acts and practices are deceptive to the public and affected consumers as to their legal rights and obligations, and by use of such deception, falsifying documents and concealment, may preclude consumers from exercising legal rights to which they are entitled.

73. The unlawful, unfair and fraudulent business acts and practices of Defendants described herein present a continuing threat to members of the general public and the Plaintiff in that Defendants and the DOE Defendants are currently engaging in such acts and practices, and will persist and continue to do so unless and until an injunction is issued by this Court.

74. Pursuant to the ACFA Plaintiff seeks an order enjoining Defendants from engaging in the acts and practices as hereinabove alleged, and ordering that Defendants credit the Transaction and provide appropriate restitution to the Plaintiff.

75. Plaintiff seeks recovery of attorneys' fees, costs and expenses incurred in the filing and prosecution of this action pursuant to the ACFA and any other applicable law.

VII. Jury Trial Demand

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and hereby demands, a trial by jury.

VIII. Prayer for Relief

WHEREFORE, as a result of the violations of TILA; Reg. Z, pursuant to 15 U.S.C. §§ 1635, 1602(u), 1640(a), and the ACFA, Plaintiff prays for judgment against Defendants as follows:

1. Rescission of this transaction;

2. Termination of any security interest in Plaintiff's property created under the transaction;

3. Return of any money or property given by the Plaintiff to anyone, including all Defendants, in connection with this transaction;

4. Statutory damages of no less than $2,000 for the disclosure violations as provided under 15 U.S.C. § 1640;

5. Statutory damages of $2,000 if Defendants fail to respond properly to Plaintiff's valid rescission notice;

6. Statutory damages as provided by state law and the ACFA;

7. Enjoin Defendants during the pendency of this action, and permanently thereafter, from instituting, prosecuting, or maintaining a proceeding on the Plaintiff's Property, from recording any deeds or mortgages regarding the Property except, a lawful release of lien, and from otherwise taking any steps to deprive Plaintiff's ownership of the Property;

8. Order that, if Defendants fail to further respond lawfully to Plaintiff's valid notice of rescission, Plaintiff has no duty to tender, but in the alternative, if tender is required, determine the amount of the tender obligation in light of Plaintiff's claims, and order Defendants to accept tender on reasonable terms and over a reasonable period of time;

9. Reasonable attorneys' fees and costs of suit;

10. Actual damages in an amount to be determined at trial;

11. For such other and further relief as the Court may deem just and proper.

Dated: December 1, 2008

By: ______________________________

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